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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO HERNANDEZ,

Defendant and Appellant.

G038993

(Super. Ct. No. 06NF1186)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard W. Stanford, Jr., Judge. Affirmed.

Theresa Osterman Stevenson, under appointment by the Court of Appeal,
for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda
Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff
and Respondent.

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INTRODUCTION

A jury convicted Julio Hernandez of participating in a criminal street gang (Pen. Code, § 186.22, subd. (a)) and being an accessory after the fact (*id.*, § 32). The jury found true the allegation under Penal Code section 186.22, subdivision (b)(1) that Hernandez committed the crime of being an accessory after the fact for the benefit of, at the direction of, or in association with a criminal street gang. The trial court denied Hernandez's request to dismiss a prior strike, struck a prior prison term enhancement, struck the gang enhancement for purposes of sentencing, and sentenced Hernandez to a prison term of seven years eight months.

We conclude (1) substantial evidence supported the convictions on the criminal street gang and accessory after the fact counts, and supported the true finding on the gang enhancement; (2) the trial court did not err by permitting the prosecution's gang expert to testify to ultimate issues and to respond to the hypothetical based on the facts of this case; and (3) the trial court did not abuse its discretion when it declined to dismiss a strike for sentencing purposes. We therefore affirm.

FACTS

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

I. *The Crimes*

About 2:45 p.m. on March 31, 2006, Anaheim Police Officers Michael Nichols and Rod Duckwitz, while on motorcycles working radar speed enforcement, pulled over a white Toyota Camry for speeding. The driver of the Camry, David Vidal, drove into a service station at the southeast corner of Ball Road and Walnut Street.

Nichols rode up behind Vidal on the passenger side, and Duckwitz rode up behind Vidal on the driver's side.

Nichols stepped down from his motorcycle and walked toward the Camry. As he approached on the passenger side, the Camry suddenly started to back up and, at a speed of 10 to 15 miles per hour, struck Duckwitz's motorcycle, knocking it over. Anticipating a pursuit, Nichols returned to his motorcycle and started it. He looked up and saw the Camry, head-on, coming quickly toward him. The Camry struck Nichols, knocking him backwards off the motorcycle and injuring him. Hernandez was not at the scene.

Soon afterwards, the Camry was spotted parked on the 1500 block of West Elm Street in Anaheim. Anaheim Police Officer Catalin Panov and Anaheim Police Investigator Bruce Linn were assigned to surveil the car from different positions. As Panov sat alone in an unmarked car, he saw a dark-colored car drive past him. The driver of the dark-colored car was a Hispanic man with a shaved head. The passenger, later identified as Hernandez, wore a hat pulled down over his forehead. Linn watched as the dark-colored car drove past him, stopped, and dropped off Hernandez, who then drove off in the white Camry. After driving a short distance, Hernandez stopped and got out of the car. He tried to remove the rear license plate, but only was able to remove the frame. He threw the broken license plate frame into the car and drove away.

Hernandez drove the Camry one or two miles to a parking lot abutting an auto body shop. After parking the car, he jumped over a fence between the auto body shop and the parking lot of a bar. At the same moment, a black BMW pulled into the parking lot next to the bar. Hernandez jumped into the BMW, and it drove off.

White paint transfer was found on one of the damaged police motorcycles, and the white Camry parked near the auto body shop had damage that matched a bolt on one of the police motorcycles. An "Anaheim Angels" license plate frame was found on

the rear floor of the Camry. Hernandez's fingerprints were found on the license plate frame.

Police officers searched Vidal's house later on March 31, 2006 and found several gang-related items. They found photo albums containing photographs of Vidal with known members of the Jeffrey Street gang, a handkerchief with a drawing of Vidal's name and the letters "SUR" and "JST," a street sign of Jeffrey Street displayed on the wall, and M44 ammunition.

II. Gang Expert Testimony

Anaheim Police Sergeant Juan Reveles testified as a gang expert. He explained the organization and culture of criminal street gangs in general and of the Jeffrey Street gang in particular. Reveles had been in the gang unit of the Anaheim Police Department for six years and was assigned to monitor eight gangs, including the Jeffrey Street gang.

Reveles testified the Jeffrey Street gang was formed in the mid-1980's or early 1990's and claims a territory bounded by Cerritos Avenue on the north, Walnut Street on the east, Calle de Las Estrellas on the south, and Ninth Street on the west. The gang has 50 to 75 active members and its primary activities include robbery, extortion, assault, and felony vandalism. Reveles testified his opinion was that the Jeffrey Street gang was a criminal street gang. He based his opinion on his participation in investigating over 50 felonies; in particular, he participated in the investigation of five robberies committed by a Jeffrey Street gang member named Ponciano Murillo in 2004 and in the investigation of an extortion case in 2003 that led to the arrest of seven or eight Jeffrey Street gang members.

Reveles opined that Vidal was an active member of the Jeffrey Street gang as of March 31, 2006, had high status within the gang, and was involved in the 2003 extortion case. Reveles also testified his opinion was Hernandez was an active member

of the Jeffrey Street gang as of March 31, 2006 and had been so since 1998. His opinion was based on Reveles's numerous contacts with Hernandez, comments made by Hernandez that he was associated with the Jeffrey Street gang, information received from other police officers, and tattoos on Hernandez's body. In addition, Hernandez was arrested in 2000 for sales of narcotics, and admitted as part of his plea, under penalty of perjury, he was an active member of the Jeffrey Street gang "whose members he knew engage in a pattern of criminal conduct."

Presented with a hypothetical based on the facts of this case, Reveles opined that the person in the hypothetical representing Hernandez committed the crime of accessory after the fact to benefit a gang member and the gang as a whole by assisting the criminal conduct of another gang member. Reveles opined the person in the hypothetical representing Hernandez took the car to the auto body shop to benefit the gang by trying to keep the person in the hypothetical representing Vidal out of custody.

DISCUSSION

I. The Evidence Was Sufficient to Support the Convictions and the True Finding on the Gang Enhancement Allegation.

Hernandez contends the evidence was insufficient to support the conviction for accessory after the fact, the conviction for active participation in a criminal street gang, and the jury's true finding on the gang enhancement allegation. "In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports

the decision, not whether the evidence proves guilt beyond a reasonable doubt.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) This standard applies to convictions based on circumstantial evidence (*People v. Perez* (1992) 2 Cal.4th 1117, 1124) and to findings on gang enhancement allegations (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322).

Applying that standard, we conclude substantial evidence supported the convictions for accessory after the fact and active participation in a criminal street gang, and the true finding on the enhancement allegations.

A. *Accessory After the Fact*

Penal Code section 32 defines the crime of accessory after the fact: “Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.” The crime of accessory consists of the following elements: (1) a principal, someone other than the defendant, must have committed a specific, completed felony; (2) the defendant must have harbored, concealed, or aided the principal; (3) with knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) with the intent that the principal avoid or escape from arrest, trial, conviction, or punishment. (*People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 836.)

Hernandez contends the evidence was insufficient to support the third element—that he knew Vidal had committed the felony. Hernandez emphasizes he was not present when Vidal drove the Camry into the police officers, and claims there was no evidence he spent time with Vidal before the crime or that he ever learned of it afterwards.

The evidence showed that within a short time after the crime, Hernandez was driven to the location where the Camry had been spotted. Hernandez wore a hat

pulled down over his forehead. After driving the Camry a short distance, Hernandez tried to remove the rear license plate. He drove the car to an auto body shop and left it in the body shop's parking lot. He jumped a fence and was picked up by a black BMW that simultaneously drove into a parking lot next to a bar. Reasonable deductions from this evidence are that Hernandez took the Camry to the auto body shop to have damage from the crime repaired, and that he did so stealthily because he knew Vidal had used that car to commit a crime.

In addition, evidence of Hernandez's gang membership supports a reasonable inference he knew Vidal had committed a felony. "[I]n determining whether a defendant had the requisite knowledge and intent to commit the crime of accessory, the jury may consider 'such factors as [the defendant's] possible presence at the crime or other means of knowledge of its commission, as well as his companionship and relationship with the principal before and after the offense.'" (*People v. Plengsangtip, supra*, 148 Cal.App.4th at p. 837.) Reveles, the prosecution's gang expert, testified that in his opinion, both Hernandez and Vidal were active members of the Jeffrey Street gang. Vidal had seniority and status in the gang. He was, according to Reveles, a "shotcaller" in the gang, leading to the reasonable inference Vidal directed Hernandez to remove the Camry. Although Reveles testified not every gang member might necessarily know each other, the jury could deduce Vidal and Hernandez did know each other.

B. *Active Participation in a Criminal Street Gang*

Hernandez argues: "The evidence adduced at trial was insufficient to support [the] conviction for violation of Penal Code section 186.22, subdivision (a) since the record, when viewed as a whole, reflects no evidence that [Hernandez] was active in the Jeffrey Street gang at the time of the incident in March 2006 and no evidence that [Hernandez] knew Mr. Vidal was active or had ever participated in the Jeffrey Street gang."

Subdivision (a) of Penal Code section 186.22 provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

The evidence supported a finding that Hernandez was an active member of the Jeffrey Street gang on March 31, 2006. In 2000, Hernandez was arrested for sales of narcotics, and admitted as part of his plea, under penalty of perjury, he was an active member of the Jeffrey Street gang “whose members he knew engage in a pattern of criminal conduct.” A term of his probation was he could not enter territory claimed by the Jeffrey Street gang. Reveles testified Hernandez’s willingness to violate the terms of his probation and continually reenter the gang’s claimed territory was significant to Reveles because it showed commitment to the gang.

Reveles opined that Hernandez was an active member of the Jeffrey Street gang as of March 31, 2006. Reveles had had numerous contacts with Hernandez since 1998, when Hernandez was 16 or 17 years old. Early in the course of those contacts, Hernandez mentioned he associated with the Jeffrey Street gang and had the moniker “Night Owl.” In July 2004, an Anaheim police officer had contacted Hernandez while he was in the company of another Jeffrey Street gang member. Hernandez told the police officer he had just been with two other active members or known associates of the Jeffrey Street gang. According to Reveles, “in my experience it’s very unlikely that he would be associating with any active member of the gang when he is not a member of it.” In 2003, during a police contact, a police officer noticed Hernandez had tattoos of a star and “O.C.,” which Reveles considered to be gang related. During another police contact in December 2002, Hernandez was in the company of Douglas Turcios, a known Jeffrey Street gang member.

The police had fewer contacts with Hernandez between 2002 and 2006. But as Reveles explained, Hernandez was in and out of custody during that period.

From the evidence obtained from police contacts with Hernandez, and his admissions made in his 2000 guilty plea, the jury could reasonably infer that Hernandez actively participated in the Jeffrey Street gang as of March 31, 2006.

The evidence also supported a finding that Vidal was an active participant in the Jeffrey Street gang as of March 31, 2006. Reveles opined that Vidal was an active member of the Jeffrey Street gang, had high status within the gang, and was involved in the 2003 extortion case. Reveles's opinion was based on the following: (1) during the extortion case, Vidal wrote several letters to Douglas Turcios, a Jeffrey Street gang member; (2) gang-related items found in Vidal's house, including the photographs of himself with other gang members, the Jeffrey Street sign, and the handkerchief; (3) a note Vidal wrote while in jail to Jose Rojas, another gang member, telling Rojas "he [Vidal] has a loud voice and a long reach" and telling Rojas he no longer could be in the Jeffrey Street gang; (4) Vidal's earlier statement to a police officer that he was a member of the Jeffrey Street gang, that he had been jumped into the gang at age 14, and that he had the moniker "Mugsy"; and (5) Vidal has Jeffrey Street tattoos on his body.

Reveles acknowledged that Vidal had been a heroin addict for some time, and that in an interview with a deputy district attorney in 1995, Vidal said he was no longer active in the Jeffrey Street gang due to his drug addiction. Police reports from 1997 and 1998 noted Vidal was under the influence, and a report from 2005 noted Vidal was in possession of heroin.

However, the jury could find that Vidal had become reactive in the Jeffrey Street gang, or that Vidal was lying when he told the deputy district attorney he was no longer an active gang member. In particular, the gang-related items found in Vidal's house during a search conducted just after the assault on the police officers support the

conclusion Vidal was an active participant in the Jeffery Street gang as of March 31, 2006.

C. Gang Enhancement Allegation

Hernandez challenges the sufficiency of the evidence to support the jury's true finding on the gang enhancement allegation under Penal Code section 186.22, subdivision (b)(1). He argues the evidence did not support findings that Hernandez and Vidal were active participants in the Jeffrey Street gang as of March 31, 2006, and the evidence did not support a finding he moved the Camry for the benefit of, at the direction of, or in association with a criminal street gang.

The trial court struck the Penal Code section 186.22, subdivision (b)(1) gang enhancement for purposes of sentencing and therefore did not impose the enhancement. Nonetheless, the evidence supported the jury's true finding on the gang enhancement allegation. The gang enhancement of section 186.22, subdivision (b) applies when the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (Pen. Code, § 186.22, subd. (b)(1).) Specific intent to benefit the gang is not required. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

As we have explained, the evidence supported findings that Hernandez and Vidal were active participants in the Jeffrey Street gang as of March 31, 2006. From the evidence, the jury could reasonably infer that Hernandez knew of Vidal's attempted murder of the police officers. Reveles testified his opinion was Hernandez drove the Camry to the auto body shop parking lot (and tried to remove the license plate en route) to further or benefit the Jeffrey Street gang by trying to keep one of its members out of custody. That was a proper subject of expert testimony. (E.g., *People v. Ferraez* (2003)

112 Cal.App.4th 925, 930-931.) As explained in the next part, the hypothetical based on the facts of the case was proper.

*II. The Trial Court Did Not Err by Allowing the
Gang Expert to Respond to the Hypothetical
Based on the Facts of the Case.*

Hernandez argues the trial court erred by permitting Reveles to respond to the prosecution's hypothetical based on the facts of this case because the hypothetical permitted Reveles to testify on ultimate issues of fact and misstated the evidence.¹ We conclude the hypothetical was proper.²

¹ This is the hypothetical: "In this hypothetical we have a known and a documented, an active shotcaller within the Jeffrey Street criminal street gang. We will call him Mr. V. for purposes of the hypothetical. Mr. V. is driving his car one day in Anaheim in the area of Ball and Walnut when two motor officers of Anaheim P. D. attempt to pull him over for a traffic violation. [¶] Mr. V. pulls into a nearby parking lot and appears to be coming to a stop in the parking stall. One motor officer pulls to the driver's side rear of Mr. V.'s car while the other motor officer pulls to the passenger side rear, offset to the side approximately five feet on each side, the second one on the passenger side. [¶] Both motor officers then get off of their motorcycles. Suddenly, Mr. V. begins to back his vehicle up turning it to the driver's side and colliding with the motorcycle of one of the police officers. This police officer jumps out of the way of the collision. [¶] Mr. V. then places his car into drive and steers his car directly into the second motor officer who had returned to his motorcycle to attempt to activate his police radio. [¶] After causing that motorcycle to fall to the ground with the officer still on that motorcycle, Mr. V. then speeds out of the parking lot. [¶] A short while later, other Anaheim police officers locate the car that had been driven by Mr. V. They conduct surveillance for a time on the car and soon see another known, documented and active Jeffrey Street gang member, we will call him Mr. H., drive up to the—to Mr. V.'s car and get in the driver's side of Mr. V.'s car and drive it away. [¶] Police officers then watch as Mr. H. parks on a nearby street, gets out of the—gets out of Mr. V.'s car, and tries to physically remove the rear license plate of Mr. V.'s car. Mr. H. is successful in removing only the rim of the license plate. [¶] Eventually, Mr. H. is seen driving into an auto body shop approximately one to two miles from the place where he picked up Mr. V.'s car— [¶] Ms. Cemore [defense counsel]: Objection. That misstates the evidence. [¶] The Court: Noted. Preserved for the record. Overruled. [¶] The jury will be instructed on what a hypothetical is and how you can judge the validity or weight of the value of a hypothetical. I will give you that instruction later. [¶] Q. By Ms. Crommett [the prosecutor]: Eventually the car is left at

Hernandez asserts that “through the hypothetical, Officer Reveles provided expert witness testimony on the ultimate issues of the case, specifically that, in [his] opinion, [Hernandez] was an active participant in the Jeffrey Street gang and that [he] moved Mr. Vidal’s vehicle for the benefit of the gang.” An expert, including an expert on criminal street gangs, may testify in the form of an opinion that encompasses ultimate issues in the case. (Evid. Code, § 805; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371.) An expert may testify to the ultimate issue raised by gang allegations, including whether the defendant is a member of a criminal street gang (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464), whether the criminal conduct was gang related (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1208-1209), or whether and how a crime was committed to benefit a gang (*People v. Ferraez, supra*, 112 Cal.App.4th at pp. 930-931). The hypothetical in this case, which encompassed the ultimate issues whether Hernandez was an active member of the Jeffrey Street gang and whether he acted to further or benefit the gang, was proper.

Hernandez argues the hypothetical was improper because it misstated the evidence by (1) describing Mr. H. as a “known, documented and active Jeffrey Street gang member” and (2) stating Mr. H. was seen “driving into an auto body shop” and “the car is left at this auto body shop.” An expert may offer an opinion based on facts given in a hypothetical that assumes their truth if the hypothetical is “rooted in facts shown by the evidence.” (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.)

this auto body shop where it is later recovered by police. [¶] Now, sir, with those hypothetical facts in mind, I’d like to ask you, do you have an opinion as to whether this crime, the crime of—Mr. Vidal’s crime involving the motor officers—Mr. V.’s crime involving the motor officers, and Mr. H.’s crime involving taking Mr. V.’s car away, if that had anything to do with Jeffrey Street criminal street gang?”

² We note the hypothetical uses the initials H. and V. to refer to Hernandez and Vidal. The better practice is to use neutral initials, such as A and B, because doing so is consistent with the purpose and rationale for using a hypothetical.

The hypothetical facts presented to Reveles were properly rooted in the evidence presented at trial. As explained above, the evidence supported a finding that Hernandez was an active member of the Jeffrey Street gang as of March 31, 2006.

Hernandez cites to evidence he had moved out of the area for a period of time between 2005 and 2006 as proof he had ceased any involvement in the Jeffrey Street gang by the time the crime was committed.³ The jury could consider any such evidence, but it did not disprove he was a gang member or render the hypothetical invalid.

Hernandez argues the evidence showed he did not drive the Camry “to an auto body shop” but drove it to “an outside public parking lot of a strip mall that housed a number of businesses – only one of which was an auto body shop.” Anaheim Police Investigator Linn, who was assigned to surveil the Camry, testified he saw the Camry “[t]raveling westbound on Katella, then turning into an auto body repair area. It’s not covered, it has no cover on it. It’s an outdoor parking area for an auto body repair shop on West Katella.”

Anaheim Police Officer Panov testified he was sent to a bar located on the south side of West Katella Avenue to watch the Camry. Panov was asked, “what is next to that bar.” He answered, “[t]here is a Jack-in-the-Box to the immediate west, another business to the immediate east and directly south of it, behind it, is a body shop business.” On cross-examination, Panov was asked, “this parking area around these businesses, is it one large parking lot?” Panov replied, “[n]o,” explaining that each business had its own front, side, and back parking lot. Panov testified he saw the white Camry in the auto body shop lot. On recross-examination, he was asked, “[t]his parking lot by the body shop, is it shared with any other businesses in that strip mall?” He answered: “No. There is access to it, but it’s its own parking lot.” The evidence thus

³ Hernandez also contends there was evidence he “had denied current involvement” in the gang. His citations to the record do not, however, support that proposition.

supported the assertion in the hypothetical that Mr. H. drove the Camry into an auto body shop and left it there.

III. *The Trial Court Did Not Abuse Its Discretion by Denying the Request to Dismiss the Prior Strike.*

Hernandez admitted a prior conviction in October 2000 for selling heroin (Health & Saf. Code, § 11352, subd. (a)) with a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)). At sentencing in this case, Hernandez’s trial counsel requested the trial court dismiss the prior strike conviction for sentencing purposes. Hernandez argues the trial court abused its discretion by denying that request. We disagree.

A trial court has authority on its own to strike a prior conviction in furtherance of justice under Penal Code section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.) In deciding whether to strike a prior conviction, and in reviewing a trial court’s ruling, the court must consider “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes law]’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The express purpose of the Three Strikes law is “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.” (Pen. Code, § 667, subd. (b).) “[L]onger sentences for career criminals who commit at least one serious or violent felony certainly goes to the heart of the statute’s purpose—or spirit.” (*People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

A trial court’s refusal to strike a prior serious felony conviction is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) “[A] trial court

does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

As the party challenging the sentence, Hernandez has the burden ““to clearly show that the sentencing decision was irrational or arbitrary.”” (*People v. Carmony, supra*, 33 Cal.4th at p. 376.) Hernandez makes three arguments in an attempt to meet his burden.

First, Hernandez argues the trial court should have dismissed the prior strike because when he entered his plea to the prior offense in October 2000, the law was unclear whether a conviction under Health and Safety Code section 11352, subdivision (a) with a gang enhancement under Penal Code section 186.22, subdivision (b)(1) was to be considered a serious felony for purposes of sentencing under Penal Code section 1192.7, subdivision (c). Hernandez was arrested in January 2000. In March 2000, the electorate passed Proposition 21, which amended Penal Code section 1192.7 to expand the list of serious felonies. (See *People v. Briceno* (2004) 34 Cal.4th 451, 456.) To the serious felonies listed in subdivision (c) of Penal Code section 1192.7, Proposition 21 added subdivision (c)(28), which makes ““any felony offense, which would also constitute a felony violation of Section 186.22,”” a serious felony. (*People v. Briceno, supra*, 34 Cal.4th at p. 458.) Hernandez argues that when he pleaded guilty to the prior offense and enhancement in October 2000, it was unclear whether subdivision (c)(28) of Penal Code section 1192.7 applied only to the crime of active participation in a criminal street gang under Penal Code section 186.22, subdivision (a), or also applied to otherwise nonserious felonies enhanced under section 186.22, subdivision (b).

In *People v. Briceno, supra*, 34 Cal.4th at page 456, the California Supreme Court concluded the latter, stating, “the definition of ‘serious felony’ in [Penal Code] section 1192.7[, subdivision](c)(28) also includes ‘any felony offense’ that was committed for the benefit of a criminal street gang within the meaning of section 186.22[,

subdivision](b)(1).” *People v. Briceno* thus confirms Hernandez’s prior conviction was for a serious felony.

Second, Hernandez argues the trial court abused its discretion by not dismissing the prior strike “since it was not a recent offense, it did not involve violence, and [Hernandez] did not have an egregious record.” As the trial court found, seven years is not remote (see *People v. Philpot* (2004) 122 Cal.App.4th 893, 905-907 [priors committed 20 years earlier not too remote]), and, as Hernandez’s current offense, the prior strike was gang related. “Egregiousness” is not a requirement for application of the Three Strikes law; to the contrary, “the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing *requirement* to be applied in *every case* where the defendant has at least one qualifying strike.” (*People v. Strong, supra*, 87 Cal.App.4th at p. 337, italics added.) Hernandez’s record placed him squarely within the purpose of the Three Strikes law. After being sent to prison on the prior strike, Hernandez was paroled, then had his parole revoked three times. Hernandez cites to no evidence of anything in his background, character, or prospects that might take him outside of the spirit of the Three Strikes law.

Third, Hernandez argues the trial court did not consider all factors relevant to deciding whether to dismiss the prior strike. His argument is based on the trial court’s statement, made when refusing to strike the prior, that “the fact that it is so recent leads the court to believe that it should not be ignored.” A trial court is required to set forth reasons only when dismissing the prior strike. (*People v. Williams, supra*, 17 Cal.4th at p. 161 [“If [the trial court] is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes”].) The trial court’s expression of one reason for refusing to dismiss the prior strike does not show the court failed to thoroughly consider all relevant factors and properly exercise its discretion.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.